CITATIONS AND AUTHORITIES

	PAGE
Belloc v. Davis, 38 Cal. 242	10
Berka v. Woodward, 125 Cal. 119, 57 Pac. 777	13
Bronson v. Rodes, 7 Wall. 229, 74 U. S. XIX 141	10
Butler v. Horwitz, 74 U. S. (7 Wall.) 258, 19 L. Ed. 149	10
Carpentier v. Atherton, 25 Cal. 564	10
California Civil Code:	
Sec. 871	14
Sec. 1511	12
Sec. 2258	15
Sec. 2279	15
Sec. 2911	14
Sec. 3390	14
California Jurisprudence	
Vol. 1, Sec. 109, p. 828, Notes 4-5	15
Vol. 6, Sec. 70, p. 109	13
Vol. 6, Sec. 105, p. 148	13
Vol. 6, Sec. 186, pp. 310, 313	11
Vol. 6, Sec. 263, p. 440	12
Vol. 6, Sec. 265, p. 443	12
Vol. 6, p. 439	13
Vol. 25, 59, 291	14
Vol. 25, p. 332	15
Congressional Record:	
73rd, p. 4541	4
73rd, p. 4561	3
73rd, Report No. 169	4, 11
Corpus Juris:	
Vol. 13, Sec. 27, p. 225, (5)	13
Vol. 13, Sec. 339, p. 10	13
Vol. 13, Sec. 360, p. 424, (3)	13
Vol. 13, Sec. 523, pp. 560, 561	11
Vol. 37, Sec. 80, p. 338	14
Vol. 41, Sec. 319, p. 439	13
Cyc, Vol. 39, 99	14
Cyc, Vol. 39, 293	15

AUTHORITIES—*Continued*

PAGE

Dupont v. Wertheman, 10 Cal. 354 15

Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919 ..... 13, 14
French v. Edwards, 88 U. S. (12 Wall.) 151, 22 L. Ed. 534 (Cal.) 15
Frink v. Roe, 70 Cal. 296, 11 Pac. 820 15

Galland v. Lewis, 26 Cal. 46 10
Gold Reserve Act of 1934 12
Green v. Biddle, 8 Wheat 17, 5 L. Ed. 551 2

Levinson v. Boas, 150 Cal. 185, 88 Pac. 825 13

Martin v. Wade, 37 Cal. 168 13
McNut v. Nuevo L. Co., 167 Cal. 459, 140 Pac. 6 15
Missouri Pac. Ry. Co., In re, 7 Fed. Supp. 1 ..... 9, 13
Morey v. Paladini, 187 Cal. 727, 203 Pac. 760 13

Northern Sec. Co. v. United States, 191 U. S. 555, 48 L. Ed. 299 2

Public Resolution No. 10 ..... 4, 12

Randall v. Duff, 79 Cal. 115, 3 L. R. A. 754, 19 Pac. 532 15

Sheehy v. Chalmers, 4 Cal. Unrep. 617 10
Sou. Pac. Ry. v. Doyle, 11 Fed. 253 (Sawy., C. C. Cal.) 15
Standard Dictionary 16

Trebilcock v. Wilson, 79 U. S. (12 Wall.) 687, 20 L. Ed. 461 10
Tyers v. United States, 5 Court Claims 509 10

United States v. Dietrich, 126 Fed. 1 13
United States Code, Title 31, Sec. 314 ..... 10, 16

Vilhac v. Biven, 28 Cal. 409 10

In The Supreme Court

OF THE

United States

JOHN M. PERRY,
Petitioner.
vs.
THE UNITED STATES,
Respondent.

No. 532

Brief of Amicus Curiae in Support of the Contentions of The United States of America

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Preliminary Statement

Applicant is not employed as counsel in any of the above entitled cases, which involve cases where the obligor has tendered lawful money in order to get a discharge, but applicant is interested in other pending cases, involving the rights of parties who are unable or unwilling to tender lawful money to get a discharge. Said cases are pending in the District Court of the United States, Southern District of California, Central

Division, at Los Angeles, and in State Courts and City Courts in Los Angeles, where trust deeds and mortgages were given on homes and properties to secure the gold clause obligation, and where the courts are enforcing the gold clause obligation where the obligor is unable or unwilling to pay lawful money.

The equities of millions of home-owners, amounting in value to many billions of dollars will be irrevocably determined by this decision of court, if the decision of this Court does not clarify the ambiguity of the concluding sentence of the opinion **In Re Mo. Pac. R. R.,** 7 F. Supp. 1, where it states that the obligee is entitled to recover in equity only, and which conclusion the trial courts are construing to mean that the obigor must pay or the obligee is entitled to recover under the terms of his original contract in lawful money.

The circumstances justify these millions of home-owners now at the end of their road to ask the Supreme Court as their last hope to declare these rights and save their homes from destruction and them from becoming a government charge. The homes are the pillars upon which this nation stands.

It is within the court's discretion to allow this application, and it is believed that the circumstances justify a prompt decision as to these vital claims and rights.

Northern Securities Co. v. U. S., 191 U. S. 555, 48 L. Ed. 299;

Green v. Biddle, 8 Wheat 17, 5 L. Ed. 551.

If the Supreme Court will extend its opinion to clarify and state the rights involved where the obligor is unable

or unwilling to pay lawful money to get a discharge, it will void considerable litigation and suffering through the loss of homes, and at least be a comfort to these formerly stable citizens who are being so gently relieved of their homes, their equities and their life-savings and reduced to a burden upon the national treasury. As the government recently announced, last year there were approximately 13,000,000 people receiving aid from the government, with an estimate of over 23,000,000 for the coming winter. The situation is desperate and growing worse and should not be augmented. Also the congestion of the U. S. Courts through trial of these half million cases will be saved the nation if these rights are clearly and promptly announced by the Supreme Court.

As Mr. Reilly said on page 4561, 73d Congressional Record, 1st Session:

> "It is inequitable for the government of the United States to permit a situation to exist whereby the debtor who borrowed a dollar several years ago must pay today, in the liquidation of his debt, a dollar having a purchasing power of at least a dollar and a half."

As Mr. Glover said, on page 4561, 73d Congressional Record, 1st Session:

> "Public Resolution No. 10 is a part of the New Deal, and a bright day for America and when the legislation is enforced there is no reason why our government should not be back on a prosperous and sound basis economically."

As Mr. Cross, p. 4541, 73d Congressional Record, 1st Session, said:

> "Listen! Let us see the equity of it. If I had loaned you $10,000 five years ago, we would and we should have assumed that conditions would remain the same and that the purchasing power of the dollars I loaned you would be paid back in dollars having the same purchasing power; but if perchance our minds met on that, then my mind never met on any proposition that the gold dollar would run amuck and multiply itself in purchasing power, nor did yours; but the gold dollar has, and is still running amuck and as a result in accordance with the letter of the law, it enables me to rob you of twice what I loaned you, and I take your property, kick you out and let you go, and yet you say that this is fair under the letter of the law?"

> "(Public Resolution No. 10) * * * is essential for the accomplishment of national recovery."
>
> *Report No. 169*, House of Representatives, 73d Congress, 1st Session, from Committee on Banking and Currency, to accompany H. J. Res. 192, Public Resolution No. 10.

The cases in which applicant is interested are as follows:

1. No. 6905—James, entitled *California Bank v. George C. Johnson* (applicant herein) *et al.*, unlawful detainer action removed from The Municipal Court, City of Los Angeles, #351,206, in which plaintiff claims it has duly sold the home of defendants under *California Civil Code*, Sec. 2924, and duly perfected its title thereto

under *California Code Civil Procedure*, Sec. 1161a, pursuant to terms of power of sale in a trust deed executed by defendants to secure payment of a promissory note for $7500.00 payable in United States gold coin when the value of the home was $20,000; and the said sale price was $1500 less than the unpaid balance, leaving a deficiency, after taking the entire home, of approximately $1500 (gold dollars) still owing. Motion to remand was granted; judgment of dispossession has been rendered, and judgment for rent of premises since sale. Defendants have lost their home on a loan that was one-third the value of the home when made, and now after the home was taken by said bank, the defendants still owe one-fifth of the original loan, or about one-fourth of the present dollar value of the home.

2. No. 6957—Cosgrave. *Luena H. Gwin, et al v. Security First National Bank of Los Angeles, et al.*, George C. Johnson, as counsel for plaintiff; for declaratory relief as to rights of parties under trust deed securing $20,000 obligation payable in United States gold coin. Value of home when loan was made $80,000; present dollar value of home less than unpaid balance. First demurrer to complaint sustained without leave to amend.

3. Nos. 412-H and 414—Cosgrave. *Mortgage Guarantee Co. v. J. E. Renaud, et al.*, George C. Johnson, counsel for defendants; action for specific enforcement of trust deed power of sale and for possession of property and collection of rents pending sale. Present owner paid $100,000 for equity on May 2, 1934, subject to $95,000 trust deed. Receiver (without notice) granted in August, 1934, and is now operating defendant's prop-

erty. Court ignoring defenses of illegality, impossibility of performance or that obligation is against public policy. Owner unable to secure lawful money with which to pay. Replacement cost of property $300,000; no present sale value. If sale is permitted, it will wipe out entire equity paid or replacement cost value, with subsequent loss to owner of $200,000, in addition to deficiency on sale up to amount of encumbrance.

4. No. 426—Cosgrave. *Pacific Hotel Apartment Co. et al. v. Leigh M. Battson, et al.*, George C. Johnson counsel for plaintiff, to declare a trust and for accounting of trustee under trust deed given to secure an obligation of $1,325,000.00, payable in United States gold coin. Value of property when lien given, $3,000,000; present sale value, none. Owner unable to borrow lawful money with which to pay. Temporary restraining order stopping sale granted by Judge Paul McCormick. Affidavit of personal bias and prejudice filed against Judge Cosgrave, held by him insufficient and he then set aside restraining order and permitted sale to proceed. Sale had on November 16, 1934, and no bidders. Sold to note holder for $260,000, by allowing credit on notes; no cash paid. Result: Owner's $1,500,000 investment wiped out and in addition now faces a deficiency claim of over $1,000,000 on a lien that originally represented the value of less than 50% of the total $3,000,000 investment.

One of claimants to the property involved in said action No. 426-Cosgrave, has since filed an Interpleader action, #380,408, in the Superior Court of the State of California, Los Angeles County, against applicant's

clients and approximately 200 defendant claimants, calling upon them to litigate their rights. This will necessitate 200 attorneys, 40,000 cross-complaints, 40,000 demurrers, 40,000 answers, and 40,000 judgments in the State trial court and if removed to the Federal court will necessitate similar proceedings there. And then the appeals!

5. Applicant is counsel in a number of other cases involving similar equity rights, and the local courts are enforcing the gold clause obligation and permitting sales for lawful money where the obligor cannot or does not pay.

Statement of Case

What are the rights and obligations of the various parties to a gold clause obligation under the provisions of Public Resolution No. 10 and The Gold Reserve Act of 1934, where the obligor is unable or unwilling to tender lawful money to secure a discharge?

Under the panic he is unable to borrow lawful money; and even if able to, he may be unwilling to pay lawful money to get a discharge, due to three causes: (1) faith in the acts of Congress and an unwillingness to assist the obligee to collect his pound of flesh; (2) that the property today is not worth the value of the gold obligation; or (3) where the only desire to pay would be the fear of a deficiency judgment where he has other property to protect.

Then let us inquire:

a. Can the obligee recover lawful money in lieu of the specified gold coin?

b. Can the mortgagee or the trustee in a trust deed, securing the gold clause obligation, sell for the specified gold coin, *or* lawful money; and can the trustee after such sale for lawful money convey any title where the trust instrument or mortgage provides that, only in case of default, the trustee may sell for gold coin and execute and deliver a trustee's deed after such sale and after due payment in gold is made? Is not the sale for gold coin unlawful under the Gold Reserve Act, and is not a sale for lawful money in excess of the powers of sale of trustee where he is authorized to sell for gold coin only; and is not the trustee's deed a nullity?

c. What are the rights of obligor's assignee or grantee who did not assume payment of the obligation or trust deed or mortgage, but who merely took title subject to existing liens, and who acquired title for a valuable consideration after the enactment of these acts of Congress?

ARGUMENT

I.

"If (Public Resolution No. 10) * * * be valid, then on its face it clearly relieves the debtor from compliance with the provisions of the gold clause of the bonds, and the question is solved. * * * So, it is obvious, I think, that the upholding of these so-called gold clause contracts would vastly hurt, if not destroy business and shake if not over-turn the entire financial structure of this country. It would, I repeat, bankrupt well-nigh every railroad, every municipality, every road district, or similar instrumentality of state government, and well-nigh every State in the Union. And since in the financial crash

of these debtor classes, the creditor classes, now urging the letter of their bonds, might well themselves go down in the common ruin, this situation, as already suggested, should be avoided, if it is legally possible to do so, within the constitutional limits. * * * And so it follows that Public Resolution No. 10 is in my opinion valid; that the gold clause is therefore unenforceable in the ultimate letter thereof as urged by intervenors, and is enforceable, in equity only (where the debtor offers to pay in order to secure a discharge)."

Judge Faris, *In re Mo. Pac. R. R. Co.*, 7 F. Supp. 1.

II.

Obligor May Not Do Indirectly What He is Prohibited From Doing Directly

"It can not, of course, be doubted that should payment be decreed to be made in paper money equivalent of gold, the power of the Congress in the premises will be just as effectually thwarted and nullified as if payment in gold were decreed."

In re Mo. Pac. R. R. Co., 7 Fed. Supp. 1.

III.

An Obligation Payable in Specific Coin or Currency is That and Nothing Else

"In other words, the contract does not say that if gold is no longer money when pay day comes, then payment shall be made in such money as is current; but on the basis of the amount of current money which a gold dollar will buy. I think the very terms of the contract preclude such a judgment. * * * "

Judge Faris, *In re Mo. Pac. R. R.*, supra.

An obligation payable in specific coin or currency is that and nothing else. By the admitted and settled rules of law, such a contract can be performed, according to the agreement of the parties, only by a payment of the kind of money specified. It has no "obligation" independent of that provision; and so of contracts payable in currency specifically, or in bullion or in wheat, etc.

Carpentier v. Atherton, 25 Cal. 564, 582;
Sheehy v. Chalmers, 4 Cal. Unrep. 617, 618;
Galland v. Lewis, 26 Cal. 46, 49, 50;
Tyers v. U. S., 5 Court Claims, 509;
Butler v. Horwitz, 74 U. S. (7 Wall), 258, 270, 19 L. Ed. 149, 150;
Trebilcock v. Wilson, 79 U. S. (12 Wall), 687, 700, 20 L. Ed. 461.

Contracts payable in gold or silver dollars, can only be satisfied by the payment of coined dollars, and can not be discharged by notes of the United States declared to be a legal tender in payment of debts.

Bronson v. Rodes, 7 Wall. 229, 74 U. S. XIX. 141;
Title 31, Sec. 314, U. S. C.;
Vilhac v. Biven, 28 Cal. 409, 414;
Carpentier v. Atherton, 25 Cal. 564, 582.

The designation of a specific kind of money in the contract is a material element of the contract. It failing, the entire contract falls. To substitute another medium of payment is a material modification of it in a matter of substance, to which change consent of all parties is necessary.

Belloc v. Davis, 38 Cal. 242, 258.

IV.

The Law as Part of the Contract

6 Cal. Jur., Sec. 186, p. 310, p. 313;
13 *Corpus Juris*, 560, Sec. 523, p. 561.

V.

Public Resolution No. 10 Declares All Gold Clause Contracts to be Against Public Policy; It Does Not Say That the Obligation Must Be Paid in Current Legal Tender.

The second sentence of the Resolution states that every such obligation "shall be discharged upon payment" dollar for dollar in legal tender. Nowhere does the Resolution say that the obligor must pay in current legal tender; it says merely that if he pays, the obligation "shall be discharged." It is similar to the right that a third party has to go and pay the debt of another; upon such payment the obligation shall be discharged.

House of Representatives Report No. 169, accompanying the Resolution, from the Committee on Banking and Currency, states:

> "The Resolution, accomplishes three purposes: * * * 2. It provides that obligations, public and private, expressed to be payable in gold or in a specific coin or currency, *may* be discharged dollar for dollar in legal tender. * * * In the light of this situation two phenomena * * * make the enforcement of the gold clause incompatible with the public interest * * * and that in such event, they become *invalid and unenforceable.* * * * This legislation is comple-

mentary to * * * and *essential for the accomplishment of national recovery.*"

Note the words "invalid and unenforceable."

Note the use of the word "may" in 2. *May* denotes permission; *shall* denotes authority and does not impose any sense of duty. The entire context is that he *may* pay if he desires but is not obligated to pay. As Judge Faris said, under the Parity Acts current legal tender has the same value by decree of government as gold coin, and to say that he must pay lawful money in lieu of gold would be thwarting the purpose of the act, and also adding to the obligation a condition that has not been *consented* to by the obligor.

VI.
Excuses for Non-Performance

1. Legal Prohibition.

   6 *Cal. Jur.*, 440, Sec. 263;
   Gold Reserve Act of 1934;
   Public Resolution No. 10;

   California Civil Code, Sec. 1511: "The want of performance of an obligation, or an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; * * * "

2. Destruction or non-existence of subject matter.

   6 *Cal. Jur.*, 443, Sec. 265.

The Gold Reserve Act of 1934, destroyed all United States gold coin.

There were more than 1,000 billions of dollars in gold sold, with a known mined quantity of less than 10 billions of dollars. The contract was illegal when made.

3. Impossibility of performance.

6 Cal. Jur., 439;

In re Mo. Pac. R. R. Co., 7 F. Supp. 1, citing Judge Van DeVanter (now Mr. Justice Van De Vanter) in the case of *United States v. Dietrich*, 126 Fed. 1, c. 674.

4. A contract which essentially violates public policy is illegal and void. Whether a contract against public policy be executory or executed, no action may be brought, either on the contract or to recover back the consideration.

Martin v. Wade, 37 Cal. 168;

Morey v. Paladini, 187 Cal. 727, 733, 734, 203 Pac. 760;

Levinson v. Boas, 150 Cal. 185, 193, 88 P. 825;

Berka v. Woodward, 125 Cal. 119, 127, 57 Pac. 777;

6 *Cal. Jur.*, 109, Sec. 70, 148, Sec. 105;

13 *Corpus Juris*, 225, Sec. 27, 5; p. 424, Sec. 360, 3; 410 Sec. 339;

41 *Corpus Juris*, 439, Sec. 319;

Faxon v. All Persons, 166 Cal. 707, 719, 137 Pac. 919, 925, syl. 9.

VII.
Quieting Title

Both the mortgagor and his grantee may maintain a suit to quiet title or ejectment against a mortgagee in possession where the debt as well as the mortgage lien is against public policy or illegal or factually or legally impossible of performance.

Faxon v. All Persons, 166 Cal. 707, 719, 137 Pac. 919, 925, syl. 9.
37 *Corpus Juris*, 338, Sec. 80.

"A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

California Civil Code, 2911.

VIII.
Trusts and Powers of Trustees

"The following obligations cannot be specifically enforced: * * * 4. An agreement to perform an act which the party has not power lawfully to perform when required to do so; * * * "

California Civil Code, Sec. 3390.

"When the purpose for which an express trust was created ceases, the estate of the trustee also ceases."

California Civil Code, Sec. 871;
25 *Cal. Jur.*, 59, 291;
39 *Cyc.*, 99.

"A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

California Civil Code, Sec. 2279.

When the purpose for which an express trust was created ceases, the estate of the trustee also ceases, the power to sell is terminated, and no reconveyance is required.

Southern Pac. R. R. Co. v. Doyle, 11 Fed. 253, 8 Sawy. Circuit Court, D. California; 261, 262, 263, 264;

French v. Edwards, 88 U. S. (12 Wall) 151, 22 L. Ed. 534, 535, 536, Circuit Court, California;

McNut v. Nuevo Land Co., 167 Cal. 459, 464, 140 P. 6, 9.

A conveyance which an agent has no power to make is a nullity, and the legal title remains in the principal.

1 *Cal. Jur.*, 828, Sec. 109, n. 4, 5;

Frink v. Roe, 70 Cal. 296, 303, 11 Pac. 820, 827;

Randall v. Duff, 79 Cal. 115, 118, 3 L. R. A. 754, 19 Pac. 532, 534;

Dupont v. Wertheman, 10 Cal. 354, 367, 368.

"A trustee must fulfill the purpose of the trust as declared at its creation and must follow all the directions of the trustor given at that time, except as modified by the *consent* of all parties interested in the same manner, and to the same extent as an employee."

California Civil Code 2258;

25 *Cal. Jur.*, 332;

39 *Cyc.*, 293.

To substitute lawful money instead of gold coin is an entirely different and new obligation, which requires the consent of all parties.

IX.
The Panic

Money panics are caused by the inflation or deflation of value of gold and nothing else.

> "PANIC: A sudden, unreasonable, over-powering fear, especially when affecting a large number simultaneously."
>
> *Standard Dictionary.*

> "VALUE: The desirability or worth of a thing compared with the desirability of something else."
>
> *Standard Dictionary.*

Panic and value are both mental operations. Therefore, value is not a component part of any inanimate thing, and exists only in the minds of persons.

The dollar is merely a weight of gold of certain fineness, bearing the stamp of the government as weighmaster. T. 31, Sec. 314, *U. S. C.*

The values of all commodities are controlled by the law of supply and demand.

1,000 billions of dollars in gold were sold for future delivery throughout the world, with an existing quantity of less than 10 billions of dollars. This abnormal ratio between supply and demand inflated the desirability (value) for gold.

All other commodities maintain approximately the same ratio between supply and demand and have the

same comparative value today as in the old prosperous days. In other words, your home today will exchange for just as good a home or just as much wheat, or stocks, or what have you, as in the prosperous times, varying only with the fluctuating values of each commodity under the law of supply and demand. While your home will sell today for only one-fourth as many dollars, that amount of dollars has four times their former value and will buy four times as much value, and the result is the same. Where then has any commodity been depressed in value; only gold is now inflated in value.

If you buy an article at a total cost of $600 and sell it for $1,000, do you make $400 (as your teacher taught you)? Suppose you bought for $600 on a 50-cent wheat market, or a value of 1200 bushels of wheat (or any other commodity you deal in); and suppose you sell on a $2.00 wheat market, you then receive 500 bushels of wheat value; and you have actually lost 700 bushels of wheat value, or 7/12ths of your investment. Is that a $400 profit?

If you manufacture an article for $100 on a 50-cent wheat market, or a cost of 200 bushels of wheat, can you compete with a manufacturer who tomorrow manufactures for $100 on a $2 wheat market or a cost of only 50-bushel wheat, or ¼th your cost today. Can industry start, with such a medium of exchange?

Five-dollar a day labor on a 50-cent wheat market receives 10 bushels of wheat; whereas on a prosperous $2 wheat market, $5 a day labor is worth only 2½ bushels of wheat, or ¼ as much in value.

Or you buy a government bond on a 50-cent wheat market for $100, calling for a cost of 200 bushels of wheat. When the wheat market is $2.00, the government bond will buy only 50 bushels of wheat, or a depreciation in commodity value of 75%. Is that bond the safest security in the world?

When you borrowed the money, each 80 cents bought one pound of butter; today each 80 cents paid calls for four pounds of butter. The extra pounds cause the panic.

A commodity dollar, based on the value, say of twenty staple raw commodities, instead of as now on the value of one commodity, gold, would make inflation and/or deflation of money value impossible, and would end money panics. But, is that wanted?

X.
Conclusion

In conclusion, Public Resolution No. 10 declares all gold clause obligations to be against public policy, invalid and unenforceable.

The Gold Reserve Act of 1934 makes all gold clause obligations illegal, prohibits such contracts under penalty, and destroys all United States gold coin.

Gold clause obligations are therefore legally and factually impossible of performance, and are invalid, illegal and unenforceable.

To require the obligor to pay lawful money where he has obligated himself to pay only a specific coin or currency would modify the obligation in substance and be

a new obligation that requires the obligor's express consent; and also would be unconstitutional.

The only equities the obligee can possibly claim is where the obligor offers to pay in lawful money to get a discharge and under such a condition, it is equitable he recover what the obligor must consent to pay to get the discharge.

Respectfully submitted,

George C. Johnson,
Amicus Curiae.